Supreme Court, U.S.
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No. 96-1459

In The

Supreme Court of the United States

October Term, 1996

ERIC PEDEN and SHARON L. SMITH, for themselves and all others similarly situated,

Petitioners,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondents' Brief in Opposition does not take issue with the fact that, starting in 1988, the State of Kansas instigated a systematic, discriminatory surtax against single people under the provisions of its state income tax code. Nor do Respondents disagree that the Kansas Supreme Court upheld this blanket discrimination on the sole basis of after-the-fact speculation that the Kansas legislature might have wanted to tax people into marriage. Instead, they oppose certiorari by trying to plant the misimpression that the unprecedented, dual-rate Kansas income tax structure is "repealed" and "defunct," and that the higher rates of tax systematically imposed on single persons are "indistinguishable" from the federal tax system. In fact, recent legislation passed by the State of Kansas does *not* eliminate the excess income tax rates imposed on single persons. The discrimination in rates continues. Also, Respondents conspicuously fail to cite one case, statute or example involving a structure like the present Kansas law or any other tax ever employed for the purpose of enticing marriage or penalizing singlehood. Respondents simply argue that there is "no constitutional difference" between the Kansas law and the federal tax code. It is precisely the difference under the unprecedented Kansas tax law – *that the State of Kansas is targeting a class of individuals and imposing higher rates of tax on their income for no other reason than they are not married* – that merits further review of this Court.

I. Respondents Grossly Mislead This Court By Stating That The Dual-Rate Kansas Tax Structure Has Now Been "Repealed" And Is "Defunct."

The dual-rate Kansas income tax structure at issue in this case has *not* been "repealed" and is *not* "defunct," as represented to this Court by Respondents.[1] In fact, even under the recent legislation passed by the State of Kansas and cited by Respondents, unmarried taxpayers will continue to be subject to higher, discriminatory income tax rates for not less than three more years. *See* Br. in Opp. App. 1a-4a. Only by the year 2000 are the tax rates charged to single persons *scheduled* to be equalized with the current married rates. Thus, contrary to Respondents' argument that the Kansas tax rate disparity is "not likely to recur" (Br. in Opp. 17), the unconstitutional taxation in Kansas has not even stopped – and it will continue to occur for at least three more years. Respondents also fail to mention that the new legislation provides no form of relief for the millions of dollars in unconstitutional taxes that have *already been* extracted from single persons since 1988, which refunds are also being sought by Petitioners in this case. *See* Pet. 8.

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[1] In their Brief in Opposition, Respondents state that "the statute has recently been repealed by the Kansas legislature." Br. in Opp. 1. Respondents also state that "the income tax structure at issue has now been repealed by the Kansas legislature." *Id.* at 9. Finally, Respondents argue that this Court should not review "the constitutionality of a defunct provision of the Kansas income tax code." *Id.* at 17.

II. Respondents Also Mislead This Court By Mischaracterizing The Unprecedented Dual-Rate Kansas Tax Structure As "Supposedly Unique."

The discriminatory Kansas tax structure is, in fact, unique among the federal government and all other states. *See* Pet. 15 n.9. Even Respondent Department of Revenue has publicly recognized that:

> " . . . Kansas is the only state that applies different rates for single and married returns."

See Minutes of House Committee on Taxation (March 6, 1992) (testimony of Steve Stotts, Director of Research for the Department of Revenue) [Petitioners' Brief (Kansas Supreme Court) at A-30]. The Kansas Supreme Court recently acknowledged in *Peden* that "Kansas is the only state in the nation that has ever imposed higher tax rates on single taxpayers . . . " Pet. App. 15a. Yet, Respondents would have this Court believe that the Kansas tax rate structure is only "supposedly unique" and that it is "hyperbole" to point out that the Kansas tax structure is unprecedented and unique. *See* Br. in Opp. 8, 17. Respondents conspicuously fail to cite one case, statute or example involving a dual-rate tax structure like the present Kansas law or any other tax ever employed for the purpose of enticing marriage or penalizing singlehood. What Respondents really try to urge upon this Court is that there is "no constitutional difference" between the Kansas dual-rate tax structure and the federal tax law. *Id.* at 12. However, Respondents ignore the obvious "difference" that at no point has the federal law ever imposed higher tax rates on single persons, or ever otherwise systematically discriminated against singles in its tax

structure, as in Kansas. No other income tax law has ever been designed, utilized or explained as legislation to encourage marriage. *See* Pet. 24-26.

Respondents also choose to ignore the fact that income-splitting for married couples – which merely takes into account the fact that a married couple constitutes two taxpayers – is a fairness measure intended to ameliorate the effect of graduated income tax rates. Income-splitting has nothing to do with promoting the institution of marriage, much less penalizing singlehood.[2]

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[2] Respondents cite two lower court decisions dealing with income-splitting as support for the Kansas Supreme Court's decision in *Peden*. *See* Br. in Opp. 16, *citing Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973), and *Sowders v. Oklahoma Tax Comm'n*, 552 P.2d 698 (Okla. 1976). However, Respondents fail to point out that both *Kellems* and *Sowders* dealt only with the question of income-splitting by married couples – *not* different rates of tax as in Kansas. Unlike the unique Kansas structure, income-splitting has nothing to do with the enticement of people into marriage nor does it create a systematic, discriminatory rate surtax on single people. *See* Pet. 24-26. *Importantly,* neither *Kellems* nor *Sowders* discussed the enticement of marriage as a possible justification for income-splitting.

CONCLUSION

Respondents erroneously argue that: "Petitioners' real complaint is not that the [*Peden*] decision conflicts with *Beach Communications* but rather that *Beach Communications* was, in their view, wrongly decided." Br. in Opp. 15, *citing FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). On the contrary, Petitioners do not disagree with the holding in *FCC v. Beach*. What occurred in *Peden* is that the Kansas Supreme Court misapplied *FCC v. Beach* to indulge a blundering legislature – transforming what was labeled as "fanciful" by the district court into "rational speculation" that now serves as the linchpin for the entire Kansas tax rate structure. The Kansas Supreme Court: (i) ignored the obvious, admitted reason for higher singles' rates (i.e., the legislature targeted a minority group for the purpose of raising revenue), (ii) used "rational speculation" to find a purpose to fit the facts (i.e., it is "rational" to speculate both that Kansas might have wanted to entice marriage through discriminatory tax rates and that the state income tax rates might rationally cause Kansas taxpayers to marry), and (iii) by its very "rational speculation" and its unprecedented conclusion that it is permissible to tax people into marriage, implicated and ignored the fundamental rights of persons in their personal decisions on marriage.

The present case involves systematic discrimination against single persons who live or work in Kansas based on a holding that it is permissible to tax people into marriage. It does not involve the mere regulation of cable television as in *FCC v. Beach*. The *Peden* decision is anything but an "unexceptional application of settled law"

(Br. in Opp. 8) as Respondents try to maintain. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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